FOR ARGUMENT

No. 76-1309

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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CITATIONS

Cases:

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Respondent's brief rests upon the following propositions: (1) consensual monitoring implicates constitutionally protected privacy rights; (2) due process requires law enforcement agencies to self-regulate this investigative technique; (3) the provisions of the IRS Manual governing the use of consensual monitoring were promulgated pursuant to this constitutional requirement and were intended to accord judicially-enforceable rights to criminal defendants beyond those provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*; and (4)

the proper remedy for non-compliance with these internal guidelines is suppression of the recordings. We have demonstrated in our opening brief that each of these contentions is unsound. In light of respondent's extended presentation, however, a few additional comments are in order.

1. The linchpin of respondent's argument (Br. 10, 14-23) is that consensual monitoring implicates privacy interests protected by the Fourth Amendment. This contention has been expressly rejected by this Court on a number of occasions. See *United States* v. *White*, 401 U.S. 745 (1971) (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952). See also *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Rathbun* v. *United States*, 355 U.S. 107 (1957). A person can have no legitimate expectation that those to whom he confides details of wrongdoing will not reveal such communications to law enforcement officers. *United States* v. *White*, *supra*, 401 U.S. at 752; *Hoffa* v. *United States*, *supra*, 385 U.S. at 302. This is especially true where, as here, the incriminating statements are made directly to a governmental officer. See *Osborn* v. *United States*, 385 U.S. 323, 327 n.4 (1966). Moreover, "[i]f the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent * * * to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." *United States* v. *White*, *supra*, 401 U.S. at 751.

Nor is there even a shred of support for respondent's related assertion (Br. 10) that investigative agencies must adopt procedures regulating the use of consensual monitoring in order to satisfy the reasonableness requirement of the Fourth Amendment. In none of the decisions upholding the permissibility of consensual monitoring has this or any other Court ever suggested that such internal guidelines are constitutionally required. Cases such as *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), and *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), on which respondent relies, are wholly inapposite. There, the Court looked to the existence of and compliance with administrative regulations in determining whether the search in question satisfied the Fourth Amendment, but only because the search would have been constitutional if carried out for one purpose but unconstitutional if carried out for another. In *Opperman*, for example, the Court sustained the warrantless search of an impounded automobile because it had occurred for caretaking purposes, in accordance with standard police procedures, rather than for investigatory purposes. 428 U.S. at 369, 375-376. The published regulations of the Vermillion police department served to confirm that the intrusion had occurred for a legitimate rather than an illegitimate reason. Consensual monitoring, by contrast, does not constitute an invasion of any constitutionally justifi-

able expectation of privacy, and hence does not involve any interest protected by the Fourth Amendment (*United States* v. *White*, *supra*, 401 U.S. at 749), regardless of the purpose for which it is carried out.

We do not contend, of course, that a government agency is free to publish and then to disregard its internal regulations at will. The relevant inquiry, however, is one under the Due Process Clause of the Fifth Amendment, not the Reasonableness Clause of the Fourth Amendment, to determine whether the government conduct in question has treated a particular defendant unfairly. Respondent would pretermit this inquiry entirely, preferring instead to ask only whether a government regulation has been violated. In respondent's view, repeated throughout his brief (Br. 42, 46, 49, 59), once an agency has chosen to adopt mandatory internal operating procedures "rather than mere precatory guidelines or policy statements" (Br. 42), *any* violation of those procedures constitutes a violation of due process of law. "Where the government has adopted procedural protections * * * and its agents have failed to obey such commands," he argues (Br. 46), "the difficult task of judicially balancing the interests is unnecessary. Whatever judgment the court might reach in weighing the competing considerations on its own is preempted by the judgment of the agency."

Once again, respondent's far-reaching assertion finds no support in this Court's decisions and has little to commend it. To the contrary, the Court has

stressed the necessity for a case-by-case analysis to determine whether alleged government misconduct has deprived a defendant of due process of law. "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion; emphasis in original). We have identified and discussed a number of the factors crucial to this individualized determination in our opening brief (pages 27-33) and have shown that respondent's conduct could not have been affected by the agents' failure to comply with the IRS Manual and, indeed, that even complete compliance with the Manual would not have influenced the agency's ultimate decision to employ consensual monitoring in respondent's case. Respondent has not challenged either of these conclusions.[1] In these circumstances, short of adopt-

[1] Respondent does allege (Br. 62-63), however, that Agent Yee and Inspector Hill intentionally violated the IRS regulations. This conclusion was not adopted by either court below and, as we pointed out in our opening brief (pages 16-17 n.4), it is not supported by the record. It is undisputed that Inspector Hill attempted to comply with the regulations by submitting the necessary documents to the IRS National Office on January 30 or 31, 1974 (A. 34-37, 63-67) and that the Director of the Internal Security Division granted approval for the monitorings prior to the January 31 and February 6 meetings (A. 34, 37, 41-42, 68, 70-72). Indeed, in view of the virtual certainty that consensual monitoring of these meetings would have been authorized in this case because of respondent's bribe attempts, respondent can offer no reason why the agents would have had a motive to evade the internal

ing respondent's *per se* rule that every time an agency violates its internal regulations it violates due process, it is difficult to understand in what manner respondent has been treated unfairly, much less why the highly probative tape recordings of his bribe offers to Agent Yee should have been suppressed.[2]

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guidelines (see A. 42). (In this regard, we have been informed by the IRS that Inspector Hill and Agent Yee obtained approval from the Department of Justice to engage in the consensual recording of respondent's conversations with Agent Yee on March 25, 1974, and that that approval was extended by the Assistant Attorney General on April 24, 1974, May 24, 1974, June 27, 1974, July 23, 1974, and August 29, 1974 (A. 78). However, none of respondent's conversations was overheard during this period.)

In any event, as the Court remarked of the due process claim in *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), "the constitutional obligation is [not] measured by the moral culpability, or the willfulness, of the prosecutor. * * * If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." While a showing of bad faith on the part of the government may be *necessary* before sanctions such as suppression may be imposed, such a showing is not *sufficient* to justify the imposition of sanctions; rather, it is "proof of actual prejudice [to the defendant that] makes a due process claim concrete and ripe for adjudication * * *." *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977). Respondent has failed to demonstrate any prejudice as a result of the violation here.

[2] Respondent's assertion (Br. 15; see also Br. 18) that this is a case of "unrestrained and indiscriminate consensual electronic eavesdropping and monitoring, unrelated to the investigation of persons properly suspected of criminal activity" can only be described as ludicrous. Agent Yee and Inspector Hill did not engage in any monitoring on their own say-so, and it is hard to imagine a clearer case for utilization of consensual monitoring as a law enforcement technique. As noted above and in our opening brief, each of the consensual

2. Relying upon legislative history that was instrumental in prompting adoption of the IRS regulations governing consensual monitoring, respondent urges (Br. 35-38) that the administrative procedures outlined in the IRS Manual were specifically formulated to protect the rights of individual citizens. We do not dispute that the regulations were adopted, among other reasons, out of concern that the uncontrolled use of electronic eavesdropping devices, even with the consent of a party to the con-

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recordings at issue here was approved by the Director of the IRS Internal Security Division, and the February 11 recording was also authorized in advance by the appropriate officials in the Department of Justice in full compliance with the IRS Manual and the Attorney General's Memorandum (A. 39-40, 42, 73-75, 77-79). Furthermore, respondent's offer of a "personal settlement" to Agent Yee in March 1974 and January 1975 unquestionably made him a proper subject of criminal investigation. From the earliest promulgation of its regulations governing consensual monitoring, in June 1965, the IRS has viewed cases involving the attempted bribery of Service employees as the most justifiable use of electronic recording devices (App., *infra*, p. 2a).

Nor can respondent find assistance for his due process claim in "vagueness" cases (Br. 10) striking down "law[s] that fail[] to define clearly the standard of conduct to which private citizens are to be held * * *." It is of course true that "[a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). But the IRS regulations apply only to government employees and do not require private citizens to take or refrain from any action. (On the other hand, there can be little doubt that respondent was well aware that his attempts to bribe Agent Yee violated the criminal laws.)

versation, could lead to abuses. See *Hearings on Invasions of Privacy Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 1276 (1965) (hereafter cited as *Privacy Hearings*). However, neither the Senate Subcommittee Hearings to which respondent extensively alludes, nor the successive versions of the IRS regulations governing employment of consensual monitoring devices, lend any support to his contention that the purpose of the regulations was to establish a system of enforceable rights for the express benefit of potential targets of an investigation. Indeed, an examination of these authorities confirms the view expressed in our opening brief that the principal objective of the internal guidelines was self-policing.

Respondent correctly notes (Br. 35) that regulations governing the use of consensual monitoring devices were promulgated by the IRS prior to those adopted in compliance with the Attorney General's October 1972 Memorandum. On June 29, 1965, the Commissioner of Internal Revenue, responding to the Senate Subcommittee's concerns about unchecked wiretapping and eavesdropping, issued a policy letter that established procedures restricting the utilization of potentially intrusive monitoring equipment (App., *infra*, pp. 1a-4a).[3] The letter explained that

[3] The guidelines contained in this letter were subsequently promulgated as IRS Policy Statement P-4200-1. These guidelines, as revised on March 9, 1967, required approval of a supervisory official as a condition to employment of electronic devices in conducting consensual monitoring. Thereafter, to

the purpose of the procedures was to minimize "[t]he * * * suspicion of the law enforcement activity which arises from the indiscriminate use of this equipment" by limiting its use "to those circumstances where it is the only reasonable means to the successful completion of the investigation." See *Privacy Hearings* 1127.

While the Subcommittee's members had focused their attention principally upon forms of nonconsensual surveillance (see, *e.g.*, *Privacy Hearings* 1146, 1212, 1249, 1260, 1262), they also had voiced the expectation that consensual monitoring techniques would not be employed indiscriminately. Several members observed that overuse would tend to bring the IRS into disrepute and that constraints upon the practice were essential to improve the agency's image and to enhance its credibility in dealing with the public (see, *e.g.*, *Privacy Hearings* 1276 (remarks of Sen. Long)). Thus, while both the Commissioner and the Senate Subcommittee were not insensitive to the privacy interests potentially involved, their objective in establishing an internal system of self-policing was to protect the public as a whole, not the particular individual whose conversations were monitored, and to engender confidence in and respect for the agency. This intent is corroborated by the fact that both the Senate Subcom-

comply with the requirements of the Attorney General's Memorandum, the guidelines were further revised to require Justice Department approval in non-emergency situations. See IRS Manual ¶ 652.22.

mittee and successive versions of the IRS regulations contemplated administrative discipline of the offending agent rather than individualized judicial remedies for the target of the surveillance as the sanction for violation of the regulations (see *Privacy Hearings* 934, 1127; *Oversight Hearings Into the Operations of the IRS Before a Subcommittee of the House Committee on Government Operations*, 94th Cong., 1st Sess. 401, 450-454 (1975) (hereafter cited as *Oversight Hearings*)).[4]

Indeed, respondent's argument itself proves this point. As he recognizes (Br. 33-34), the IRS regulations not only list the procedures for obtaining authorization for consensual monitoring, but also set forth a comprehensive scheme governing access to electronic surveillance equipment, accountability for its custody and movement, inventory procedures, and reporting requirements detailing its use. See IRS Manual ¶ 652.4(1)-(7) (Resp. App. 18-20); see also Memorandum of the Attorney General (Govt. App. 1a, 8a-9a). It certainly cannot be contended that these provisions were meant to be anything more

[4] Moreover, the Attorney General's Memorandum requires that where emergency circumstances compel consensual monitoring without advance authorization from the Department of Justice, the monitoring agency must promptly notify the Attorney General or his designee of the incident and of the reasons that precluded obtaining advance approval. This requirement also suggests that the purpose of the regulatory scheme was to establish an internal policing system rather than an enforceable procedure for safeguarding the interests of private citizens, since targets of surveillance would derive no direct benefit from such after-the-fact reporting.

than an internal "housekeeping" system, much less that the failure to follow these provisions would violate due process.

This background places this case in marked contrast to *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and the other cases on which respondent relies (Br. 43-45). The procedures involved in *Accardi* were expressly and clearly designed to protect individual aliens against arbitrary deportation determinations by requiring impartial review by an administrative tribunal, and circumvention of those procedures deprived the intended beneficiaries of important administrative safeguards. See also *Yellin* v. *United States*, 374 U.S. 109, 115 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535, 540 (1959); *Service* v. *Dulles*, 354 U.S. 363, 373 (1957); *Antonuk* v. *United States*, 445 F.2d 592 (6th Cir. 1971) (Army reservist activation regulations intended to accord procedural rights to individual service mmebers). The IRS Manual, on the other hand, was designed to enhance the integrity of the agency's investigative processes in general rather than to confer benefits on particular individuals.[5]

[5] Respondent erroneously cites (Br. 45 n.19) *Bridges* v. *Wixon*, 326 U.S. 135 (1945), as an instance in which the Court has enforced internal regulations applicable at the investigative, rather than at the administrative, stage of agency proceedings. In *Bridges* the Court held inadmissible an unsworn, unsigned statement at a deportation hearing because regulations of the Immigration and Naturalization Service specifically precluded the receipt of such evidence. This determination was not predicated on the fact that the statement had been improperly taken. Rather, it was com-

Finally, respondent appears to contend (Br. 51, 52 n.23) that the only reason Congress refrained from enacting a statute covering consensual monitor-

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pelled because the INS rule, as the Court noted, was "designed to protect the interests of the alien and to afford him due process of law" (*id.* at 152) by rendering inadmissible unreliable evidence. Moreover, the government conceded that the evidence should not have been admitted at the hearing and argued only that any objection had been waived (*ibid.*).

Respondent's attempts (Br. 40-41 & n.18) to distinguish *Rinaldi* v. *United States*, 434 U.S. 22 (1977), and the consistent judicial refusals to enforce the "*Petite* policy" over the government's objections are similarly unpersuasive. Respondent contends that "[t]he need to enforce the [*Petite*] policy over the Department's protest * * * never arises" because the Attorney General either can move to dismiss the prosecution or can grant *nunc pro tunc* authorization. But the cases in which *Petite* authorization has been granted *after* conviction all involved a violation of the *Petite* policy, since the policy (like the IRS Manual provisions at issue in this case) requires *prior* approval of the Attorney General. Insistence upon prior authorization is important in *Petite* situations because otherwise some defendants already subjected to a state prosecution might have to undergo an unnecessary federal trial for the same criminal act, a harm that cannot be undone simply by reversing any resulting conviction. Nonetheless, the courts have refused to afford relief because of the violation.

In the present case, as in a number of *Petite* situations, the Department of Justice has granted after-the-fact approval to the consensual monitoring engaged in by the IRS, both by authorizing the February 11 monitoring in advance, with full knowledge of the previous recording of respondent's conversations with Agent Yee (A. 75-76), and by vigorously opposing respondent's motion to suppress. As in the *Petite* situation, this *nunc pro tunc* authorization should dispose of any claim that the IRS's failure to comply precisely with its internal regulations prejudiced respondent or entitles him to judicial relief over the government's objections.

ing is because the Commissioner of Internal Revenue requested that the IRS instead be permitted to adopt internal regulations. This contention is not substantiated by the legislative history he cites.

To begin with, during the Senate Subcommittee Hearings the Commissioner simply outlined measures taken within the agency to regulate electronic surveillance. He did not suggest that such regulations should supplant possible legislation in the area, nor did the Subcommittee evidence any predisposition to propose legislation governing consensual monitoring. The bill that the Subcommittee ultimately proposed specifically exempted consensual monitoring from its proscriptions. S. 928, 90th Cong., 1st Sess. § 2511 (a) (1967). The reason for this exemption is that the legislation was a response to several court decisions, principally *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), that had restricted the availability of *non-consensual* electronic surveillance as a law enforcement technique. See *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972). This Court, however, had held *consensual* monitoring to be constitutionally permissible, and, hence, the Subcommittee had no need to address the matter. See *Hearings on the Right of Privacy Act of 1967 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 49, 61, 159 n.1 (1967). Title III, which was enacted in place of S. 928, contains a similar section specifically excluding consensual monitoring from its provisions. 18 U.S.C. 2511(2)

(c). This limitation was also the result of judicial decisions holding that such monitoring did not violate the Fourth Amendment, rather than reliance upon the promises of government agencies to police these practices through adoption and enforcement of internal regulations. S. Rep. No. 1097, 90th Cong., 2d Sess. 93-94 (1968).

Similarly, the 1975 testimony of the Deputy Commissioner of Internal Revenue before the House Subcommittee (cited at Resp. Br. 52) was limited to delineating ongoing and contemplated programs governing regulation of electronic surveillance techniques. Again, there was no discussion whether such programs should take the place of legislation. *Oversight Hearings* 448-455. Moreover, there is no relationship between this Subcommittee's concern with IRS surveillance practices and several earlier proposals (see Resp. Br. 52 n.23) introduced in the House of Representatives to prohibit warrantless interceptions in the absence of consent from all parties to the conversation. H.R. 9698, 93d Cong., 1st Sess. (1973), H.R. 9667, 93d Cong., 1st Sess. (1973), and H.R. 1008, 93d Cong., 1st Sess. (1973), were introduced in reaction to revelations that the *White House* had routinely recorded telephone conversations during the Nixon Administration. See 119 Cong. Rec. 27048 (1973) (remarks of Rep. Abzug); 119 Cong. Rec. 26637 (1973) (remarks of Rep. Long).[6]

[6] We do not wish to suggest by this extended discussion that the propriety of the district court's suppression order turns on an analysis of the background of IRS Manual ¶ 652.22. The key considerations remain whether the violation of the regulation prejudiced respondent and whether it is legitimate to impose the harsh remedy of an exclusionary rule. Of course, it further diminishes any notion of prejudice to respondent to demonstrate, as we have above and in our opening brief, that the IRS guidelines are quite distinguishable from the agency regulations involved in cases like *Accardi*.

3. Citing the results of a 1974 IRS audit of electronic eavesdropping and monitoring conducted within the IRS Intelligence Division, respondent asserts (Br. 60-62) that violations of IRS regulations are widespread and that application of an exclusionary rule as a prophylactic measure is warranted. Although respondent states that this survey revealed that 18 agents had conducted unauthorized monitoring during 1973,[7] he fails to note that during this period the IRS employed some 2,700 agents who potentially had access to these investigative techniques. *Oversight Hearings* 412, 455. Hence, the data hardly suggest evasion of the internal guidelines or abuses so widespread that judicial intervention is required. In any event, even if the violation of internal regulations would ever warrant blanket imposition of an exclusionary rule, a proposition we doubt, it is unnecessary for the courts to fashion a suppression remedy for violations of the IRS Manual since the Manual itself expressly provides the remedy

[7] Twelve of these cases involved the recording of conversations without advance approval within the IRS. In three instances the agents failed to obtain the authorization of the Attorney General, and in three other instances the monitoring exceeded the authorizations because an unexpected person was involved in the conversation. *Oversight Hearings* 451.

of disciplinary sanctions in appropriate cases. Cf. *United States* v. *Babcock*, 250 U.S. 328, 331 (1919).

Respondent contends, however, that dismissal is the only disciplinary sanction likely to have any deterrent effect and asserts that "the IRS's record of imposing disciplinary sanctions for violation of its electronic eavesdropping and monitoring rules has not been impressive" (Br. 59 n.25).[8] Both statements are incorrect. The IRS Manual provides for a spectrum of disciplinary measures for violations of its procedures, including removal, suspension or furlough without pay, reduction in grade or compensation, and reprimand or admonition. *Oversight Hearings* 453, citing IRS Manual ¶¶ 1982.3-1982.8. It cannot seriously be disputed that the possibility of loss of earnings, job status, and advancement potential constitutes as genuine a deterrent to unauthorized monitoring as the exclusion of evidence. Nor is there any substance to respondent's claim that the IRS typically disregards violations by failing to impose sanctions. Following disclosures of unauthorized monitoring during the 1974 IRS internal audit, each of the incidents was fully investigated and sanctions were imposed. Penalties ranged from five days' suspension to oral admonishment.[9] *Oversight Hearings* 399-411, 451.

[8] Respondent also urges (Br. 59 n.25) that, at all events, a disciplinary remedy is inadequate since, in contrast to the exclusionary remedy, it does not vest "aggrieved" persons with an invokable remedy. However, this argument misperceives the purpose of the exclusionary rule, which is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

Finally, respondent misconstrues our position that extension of the exclusionary rule to internal agency guidelines is potentially counterproductive. We have not contended, as respondent represents (Br. 57), that "if evidence acquired in violation of agency regulations is excluded, the agencies will repeal their rules." Nor do we suggest that the IRS is likely to terminate its successful program of self-policing of consensual monitoring. But it would be foolish to suppose that if the harsh sanction of suppression is imposed by courts to punish government agencies for their failure to follow self-imposed guidelines in instances, such as this case, where the violation did not prejudice the defendant, it would not tend to encourage the modification of a great many current regulations and to discourage the adoption of regulations in the future. The result would be unfortunate, since internal guidelines diminish the likelihood of arbitrary governmental action and protect societal or individual interests that, while not warranting constitutional or statutory protection, are nonetheless important.

[9] More specifically, one employee was suspended, three received written reprimands, three received oral admonishments confirmed in writing, seven received oral admonishments, and one retired before disciplinary action could be taken. No action was deemed warranted in the other three cases.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

APPENDIX

SPECIAL MESSAGE

From the Commissioner

[SEAL]

Washington, D.C.

June 29, 1965

TO ALL CRIMINAL INVESTIGATIVE PERSONNEL:

I am writing to you both officially and personally. Recently, serious allegations have been made by a Congressional Subcommittee concerning improper use of investigative equipment. On June 17, I signed the following policy statement concerning the proper use of investigative methods and equipment:

> The statutory duty of the Internal Revenue Service is to administer the Internal Revenue laws. It is the policy of the Service to perform this work fairly and impartially. Administration should be both reasonable and vigorous. A highly important part of administration of the Internal Revenue laws is the bringing to justice of willful offenders of those laws. *Of equal importance in the administration of these laws is the observance of the highest level of integrity by Service personnel in carrying out their duties. The constitutional rights and other legal rights of all persons will be fully respected and observed.* While acting at all times within the bounds of law, the methods which the Service should use in investigating violations of law

will vary with the circumstances. (Emphasis added)

These principles are especially pertinent with respect to the use of certain investigative equipment. The discredit and suspicion of the law enforcement activity which arises from the indiscriminate use of this equipment requires that its use be restricted to those circumstances where it is the only reasonable means to the successful completion of the investigation. Accordingly, the use of this equipment by investigative personnel will be subject to the prior approval of a designated official of the Service. Normally, this approval will be extended only in cases involving (1) violations of the public trust by Service employees, (2) the attempted bribery or corruption of Service employees, or (3) suspected or known members of the criminal element. In no event should there be permanent installations of this type of equipment in any Internal Revenue office.

The Assistant Commissioner (Compliance) and the Assistant Commissioner (Inspection) will take such steps as may be necessary to assure application of this policy.

As indicated in the policy statement, the Assistant Commissioners Compliance and Inspection will be taking further action to implement this policy. However, your assistance and understanding are the key to successful implementation. I am sure you are keenly aware of the need to both vigorously pursue violators of our tax laws and to assure that the rights of those investigated are in no way abridged. However, there may be those among us who, in attempting vigorous pursuit of offenders of our nation's laws, minimize their own corollary responsibility to observe these very laws and Service policy. This may be especially true when working with local law enforcement organizations not having a policy as clearly defined as does the Service.

So that no misunderstanding exists—the use of illegal wiretaps is unconditionally prohibited, as is a deliberate making of an unreasonable search or seizure. This prohibition includes the use of information obtained by anyone, government or private, through wiretaps. Tainted evidence is inadmissible in court. Use of tainted information is unacceptable as an investigative technique whether or not divulgence is made.

The Service policy to fully respect and observe the constitutional and other legal rights of all persons will be strictly enforced. I want every employee to be on notice that anyone who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service. I hope that such action is never necessary but it is only with your thorough understanding and cooperation that we can protect the integrity and reputation of our Service.

To insure this understanding, I have directed that a file be maintained in the National Office containing the signed acknowledgment of this directive by each criminal investigative employee and each supervisory or managerial official responsible for directing the activities of such employees. Such acknowledgment

will include district, regional and National Office personnel and will be supplemented as each new employee of this category is added to the rolls.

Sincerely,

/s/ Sheldon S. Cohen
Commissioner

INTERNAL REVENUE SERVICE

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